2003

Continental Insurance Company v. Joseph O. Kingston'; D.U. Company Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CONTINENTAL INSURANCE COMPANY, Appellee/Plaintiff, v. JOSEPH O. KINGSTON; D.U. COMPANY INC., Appellants/Defendants	Case No. 20030936-CA Priority No. 15
JOSEPH O. KINGSTON; D.U. COMPANY INC., Counterclaimants v. CONTINENTAL INSURANCE COMPANY; BRENT CHRISTENSEN; JACKSON INSURANCE AGENCY, Counterclaim Defendants.	(Oral Argument Requested)

BRIEF OF APPELLEE CONTINENTAL INSURANCE COMPANY

Appeal from the Third Judicial District Court
Salt Lake County, Salt Lake Department, State of Utah
Honorable Sandra Peuler

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statutes and Rules

JURISDICTION

The Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2a(3)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

Continental agrees to the general statement of the issues contained in Appellants' Brief and to the standards of review referenced therein, except as otherwise stated herein.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Rules of Evidence, Rule 406:

> Rule 406. Habit; routine practice.
>
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Utah Rules of Evidence, Rule 703:

> Rule 702. Bases of opinion testimony by experts.
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Utah Code Ann. § 31A-21-105(2):

> (2) Except as provided in Subsection (5), no misrepresentation or breach of an affirmative warranty affects the insurer's obligations under the policy unless:
>
> (a) the insurer relies on it and it is either material or is made with intent to deceive; or
>
> (b) the fact misrepresented or falsely warranted contributes to the loss.

Utah Rules of Civil Procedure, Rule 56:

> Rule 56. Summary judgment.
>
> (a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF THE CASE

A. Nature Of The Case.

This case involves an insurance coverage dispute arising out of a July 4, 1997 fire at a Bountiful residence which was owned by appellants/defendants Joseph Kingston ("Kingston") and DUC Company, Inc. ("DUC"). Following the fire, Kingston made a claim under a homeowners insurance policy which Kingston had obtained for the residence in 1994, and which had been issued by appellee/plaintiff Continental Insurance Company ("Continental"). During its investigation of the claim following the fire, Continental discovered that Kingston's original application for the homeowners insurance policy included several misrepresentations, including the following:

- Kingston's application for insurance stated that the home was built in 1990, when in fact it is undisputed that the home was actually built in the mid to late 1800's.
- Kingston's application for insurance identified the home as a single family residence, when in fact there is substantial evidence that this home was used as a

multi-family dwelling.

- Kingston's application for insurance stated that the home was covered under a prior homeowners insurance policy, when in fact, Kingston admits that he never had prior insurance on the home.

In addition to the multiple misrepresentations contained in Kingston's insurance policy application, Kingston made additional misrepresentations to Continental during the course of Continental's post-fire investigation. Based on the multiple misrepresentations made by Kingston in his application and during the course of the post-fire investigation, Continental questioned coverage on the claim and commenced a declaratory judgment action seeking to have the Third District Court declare that the Continental policy on the Kingston residence was void *ab initio* due to Kingston's misrepresentations. Continental also sought a judicial declaration to void the policy and deny coverage on the claim because Kingston had breached his contractual duties under the policy by making additional misrepresentations during the course of Continental's post-fire investigation.

In response to Continental's suit for declaratory judgment, Kingston and DUC denied that Kingston made any misrepresentations. While acknowledging that the insurance application contained incorrect information, Kingston and DUC brought third party claims against Kingston's insurance agent and agency, Brent Christensen ("Christensen") and the Jackson Insurance Agency, alleging that the misrepresentations contained in the insurance application were made by Christensen at the time the application was prepared and submitted.

The third party claims against Christensen and the Jackson Insurance Agency have been resolved, and Christensen and the Jackson Insurance Agency are not parties to this appeal.

B. Course of Proceedings and Disposition in the Court Below

Continental initially filed suit against Kingston and DUC on March 13, 1998, claiming several causes of action, including one for rescission of an insurance policy issued to Kingston Continental then filed a cross motion for summary judgment against both DUC and Kingston, asserting a right of rescission. The trial court denied DUC's motion finding that DUC had introduced no evidence upon which a waiver could be found. The court found that Kingston had made misrepresentations of his application, but the materiality of those misrepresentations appeared to involve issues of fact.

Following additional discovery, Continental renewed its Motion for Summary Judgment and filed a Motion for Summary Judgment against both DUC and Kingston on their affirmative causes of action against Continental. The trial court granted both of Continental's motions on Continentals That motion was granted on January 30, 2003. R. at 2552-2555.

Appellants now appeal the denial of DUC's Motion for Partial Summary Judgment, and the granting of Continental's Motion for Summary Judgment on Plaintiff's Cause of Action for Misrepresentation. Appellants also appeal from the trial court's rulings on the admissibility of certain testimony of Kathleen Wentzel and Brent Christensen, as well as an award of costs below.

Appellants' Brief does not present any appeal from the granting of summary judgment in favor of Continental on Appellants' affirmative causes of action.
based upon material misrepresentations.

C. Statement of Facts

In late February of 1994, Kingston approached the Jackson Insurance Agency to inquire about obtaining an insurance policy to cover his home and vehicles. Later, on March 18, 1994,

Kingston went to the Jackson Insurance Agency, an independent insurance agency, and met with Brent Christensen about getting insurance. R. 303-304, 579. During this meeting, the insurance application was filled out. Kingston represented to Christensen that the house he wished to insure was built in 1990, that it was a single family residence, and that he had prior insurance coverage on the home. R. at 580. Such representations were false as the house had actually been built in the1800's. R. at 141. The Kingston dwelling was also not used as a single family residence. R. at 387-389. Furthermore, Kingston admits that the home had never been insured prior to the issuance of the Continental policy, notwithstanding the fictional insurance policy number found in the application. R. at 488, 1406.

Before leaving Christensen's office, Kingston signed his name directly under the clear language that stated he was responsible for affirming the truth of all statements contained in the application and that such statements would be relied on by Continental to determine whether to insure the risk. The language expressly stated:

> I/We hereby declare to the best of my/our knowledge and belief that all statements are offered as an inducement to the company to issue the policy for which I/we am applying.

R. at 24.

In reliance on the policy application and its representations, Continental issued a policy of homeowner's insurance on the Bountiful home on March 18, 1997. R. at 2, 508-511. Since the policy was issued on a home believed to have been built in 1990, Continental granted Kingston a new home discount. R. at 16, and 1553.

On July 4, 1997, a fire caused substantial damage to the insured structure. Following the fire, Continental began to adjust the loss. Continental paid for alternate housing for the Kingston family and for initial demolition of the structure in order to determine the scope of the loss. R. at

1409.

Following the fire, Kingston and his wife admitted to the Bountiful City Assistant Fire Inspector, Michael Barfus, that the residence had been built so that three separate families could live at the residence. Kingston also admitted to the fire inspector that another family had been living in the north section of the house at the time the fire broke out. (R. 388, 389).

During the demolition process, Kingston stopped the demolition work and Continental commenced an investigation into the loss. R. at 1408. In connection with the investigation, Continental requested an examination under oath. R. at 2926 at p. 9. In his examination, Kingston testified that he supplied the requested information for the policy application and that he reviewed and signed the application. R. at 343.

On March 13, 1998, Continental advised Kingston of its continued investigation and adjustment of the loss under an express reservation of rights. R. at 2924 at pp. 18-19.. That same day, suit was filed in the Third District Court of Salt Lake County seeking declaratory relief, including rescission of the insurance policy issued to Kingston.

During discovery and following his own deposition, Kingston gave conflicting and contradictory testimony concerning the application process. Kingston stated:

> In preparing the application, Christensen asked me questions, and then filled in the entries. I was not shown either the application or Christensen's entries during this process...After Christensen had completed the entries, he had me sign the application. I was not given an opportunity to review Christensen's entries before signing, and was not given a copy of the application for my records.

(R. 304).

Kingston later claimed in another conflicting affidavit that Brent Christensen must have been the person to include the false information in the insurance policy because he did not do so:

> I quickly glanced through the form [application]. I noticed many of the spaces on the application had not been filled in. The space for previous insurance was blank. This was consistent with my statement to Christensen that I did not believe the home to have been previously insured. When I signed the application, the space on the form for previous insurance was still blank...the spaces for describing how far it was to the fire hydrant were also blank...the information on the lienholder was also blank...I noticed that Christensen had filled in the age of the home as having been built in 1990. I brought it to his attention that this was inaccurate.

(R. 1878).

SUMMARY OF THE ARGUMENT

Continental contends that the trial court properly granted its Motion for Summary Judgment on its cause of action for material misrepresentation. The granting of summary judgment voided the Continental policy *ab initio* as a matter of law. The trial court's determination was made after finding that Kingston was bound by his policy application misrepresentations and hat said representations were material as a matter of law.

Continental argues that it was entitled to rescind the insurance policy as a matter of law both under Utah statute, the provisions of the policy itself, and under common law principles. Continental argues that the trial court correctly determined the misrepresentations were not innocent misstatements, that Kingston's misrepresentations cannot be imputed to Brent Christensen because the latter served as an independent insurance broker, not Continental's captive agent.

Continental maintains that it had no duty to inspect the Kingston home before or after insuring the residence.

Continental did not waive its right to rescind the policy, nor was Continental estopped to rescind the policy based upon both its pre-loss and post-loss conduct.

Continental maintains that the testimony of Kathleen Wentzel and Brent Christensen was

properly considered by the trial court under Rules 406 and 703, Utah R. of Evidence.

As a prevailing party, Continental was properly awarded deposition costs and witness fees.

ARGUMENT

I. THE TRIAL COURT'S GRANT OF CONTINENTAL'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED.

Continental contends that the trial court properly granted summary judgment in favor of Continental, thereby making the Continental policy void *ab initio* as a matter of law because the undisputed facts show that Kingston's insurance application contained a material misrepresentation regarding the age of the home that Continental relied on when issuing the policy.

A. Continental Was Entitled To Rescind The Policy And Deny Coverage Pursuant To Utah Law And The Policy.

The Utah Legislature has enacted statutes that permit insurers to rescind a policy and deny coverage in certain situations where the insured has made misrepresentations to the insurance company. Utah Code Ann. §31A-21-105(2) permits rescission of an insurance contract where material misrepresentations are made by an insured. Specifically, the statute states as follows:

> (2) . . . [N]o misrepresentation or breach of an affirmative warranty affects the insurer's obligations under the policy unless:
>
> > (a) **the insurer relies on it and it is either material or** is made with intent to deceive; **or**
> >
> > (b) the fact misrepresented or falsely warranted contributes to the loss.

Utah Code Ann. § 31A-21-105(2) (emphasis added).

The Utah Supreme Court has previously recognized that these "statutory alternatives are stated in the disjunctive, not the conjunctive." See Derbidge v. Mutual Protective Ins. Co., 963

P.2d 788, 790 (Utah 1998) (citing Berger v. Minnesota Mut. Life Ins. Co., 723 P.2d 388, 390 (Utah 1986)). Therefore, in order to rescind or otherwise "invalidate a policy because of misrepresentation by the insured, an insurer need prove applicable only one" of the following three alternatives: 1) the misrepresentation was material and the insurer relied thereon; **or** 2) the misrepresentation was made with an intent to deceive and the insurer relied thereon; **or** 3) the misrepresented fact contributed to the loss. Id. For purposes of its Motion for Summary Judgment below, Continental focused on the first alternative. As discussed more fully below, Continental maintains that summary judgment in favor of Continental was appropriate because it satisfied the first alternative by establishing that Kingston's insurance application contained a ***material misrepresentation*** regarding the age of the home, and that Continental relied on that misrepresentation in deciding to issue the policy to Kingston.[1]

In addition to the statutory provisions, the Continental policy issued to Kingston also includes a provision which allows it to deny coverage where the insured has concealed or misrepresented any material fact or circumstance or made false statements whether as to policy eligibility or claim entitlement. Specifically the Continental policy states:

> **10. CONCEALMENT OR FRAUD**
>
> This insurance is based on your **honest cooperation** with us so the information you gave to us **must be correct to the best of your knowledge.**
>
> Therefore:
>
> (a) For Personal Liability, Optional Excess Liability

[1] Utah Code Ann. § 31A-21-303 offers further evidence of the legislative efforts to discourage misrepresentations by insureds by allowing insurance companies to cancel insurance policies prior to their expiration dates when the insured makes a material misrepresentation to the insurance company.

Home – Medical Expense and Dwelling Fire – Medical Expense, we **do not provide coverage** to one or more covered persons who whether **before or after a loss** has:

(1) **Concealed or misrepresented any material fact or circumstance**; or

(2) Engaged in fraudulent conduct; or

(3) **Made false statements relating to this insurance;**

whether as to eligibility or claim entitlement.

(b) For all other coverages, we **do not provide coverage** if whether **before or after a loss** one or more covered persons has:

(1) **Concealed or misrepresented any material fact or circumstance**; or

(2) Engaged in fraudulent conduct; or

(3) **Made false statements relating to this insurance;**

whether as to eligibility or claim entitlement.

See Continental policy at p. 3 (R. 375) (emphasis added).

In addition, well established common law principles recognize the right to rescind a contract *ab initio* where the contract has been induced by a material misrepresentation. The Restatement (Second) of Contracts § 164 provides:

> (1) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Furthermore, under Restatement (Second) of Contracts § 164(2) a contract may be voided even if there was an unintentional misrepresentation so long as the misrepresentation was material

to the contract. See Restatement (Second) of Contracts § 164(2); Calamari and Perillo, The Law of Contracts, 4th Ed. (1998) § 9.15.

Courts have long extended these same common law principles to insurance contracts. One court has noted that "there is no question but that, at common law, the right of rescission *ab initio* for fraud and misrepresentation was available to an insurance company." Continental Western Insurance Co. v. Clay, 811 P.2d 1202, 1205 (Kan. 1991); American States Ins. Co. v. Ehrlich, 701 P.2d 676 (Kan. 1985); See also State Farm Mutual Auto v. Wood, 483 P.2d 892 (Utah 1971)(Remanding denial of insurer's right of rescission to trial court for further factual findings); Dairyland Insurance Co. v. Smith, 646 P.2d 737 (Utah 1982)(rescission of automobile insurance above statutory minimum upheld in case where insured misrepresented the identity of the vehicle's sole operator).[2]

Thus, pursuant to the applicable Utah insurance statutes, the express language of the policy, and the common law, Continental is entitled to rescind the policy and deny coverage if

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[2] Courts have created a limited exception to this rule in the limited context of mandatory automobile financial responsibility laws:

> Courts that have considered the issue have universally held that in the case of an innocent third party who has suffered injury from the insured's operation of an automobile, there is no right of rescission ab initio even for the most blatant fraud. In some, but not all, of those cases, the rational for the decision was a statutory enactment similar to K.S.A. 1989 Supp. 40-3118(b)...[That is], an insurer cannot, on the ground of fraud or misrepresentation, retrospectively avoid coverage under a compulsory insurance or financial responsibility law so as to escape liability to an innocent third party.

Continental Western Insurance, 811 P.2d at 1205. See also, Dairyland, 646 P.2d at 738.

Kingston made any ***material misrepresentation*** to Continental, either in his original application or during the claim investigation. While Continental maintains that Kingston made numerous material misrepresentations both in his original application and during the post-fire claim investigation, for purposes of this appeal and Continental's Motion for Summary Judgment, the focus is solely on Kingston's misrepresentation of the age of the home in the insurance application.

At least one court, has allowed a casualty insurer to void insurance coverage *ab initio* for material misrepresentations as to the age of the insured item. In Certain Underwriters at Lloyds v. Montford, 52 F.3d 219 (9th Cir. 1995), an insurance policy was properly voided on the basis of misrepresentations regarding the age of the insured ship. After having received a claim for the disappearance of the ship, the insurer in Montford sought to avoid the policy after discovering that misrepresentations had been made regarding the age of the vessel. The trial court ruled that the insurance company was entitled to disavow the insurance contract if the insured "made any intentionally false misrepresentations, or the policy itself expressly declared that any fraud, concealment, or misrepresentation of material facts would void the policy." Id. at 219.

On appeal, the Ninth Circuit affirmed the trial court's ruling finding that because the insured had misrepresented the purchase price of the vessel, the age of the vessel, and his prior loss history, the doctrine of *ab initio* relieved the insurer from any duties under the insurance contract. Id. at 222.

It is undisputed that Kingston's responses in his insurance application misrepresented the age of the structure by more than 100 years. Thus, the only real issue is whether the misrepresentation of the age of the structure was ***material***. In the context of an insurance application, a misrepresentation of fact would be material if it is: 1) something which insurance

companies want to know, 2) something which would tend to increase the likelihood or extent of risk, and/or 3) something which would impact the amount of premium to be charged. Black's Law Dictionary includes the following definition of the term "material fact" in the context of insurance:

> *Insurance.* A fact which, if communicated to the agent or insurer, would induce him either to decline the insurance altogether, or not accept it unless a higher premium is paid. One which necessarily has some bearing on the subject matter. A fact which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium. Any fact the knowledge or ignorance of which would naturally influence the insurer in making or refusing the contract, or in estimating the degree and character of the risk, or in fixing the rate.

Black's Law Dictionary 977 (6th ed. 1990).

The Utah Supreme Court has held in at least one context that the materiality of a misrepresentation in an insurance application is determined by whether the misrepresentation was material to **that insurer's** acceptance of the risk. Prudential Property & Cas. Ins. Co. v. Mardanlou, 607 P.2d 291 (Utah 1980). In Mardanlou, the Utah Supreme Court applied a subjective standard based upon what Prudential Property considered material, rather than an objective or "reasonable insurer" standard. In that case, the insured, Mardanlou, applied for and received homeowner's insurance based in part on his misrepresentations that he had never had a prior loss or had a policy canceled. Id. 607 P.2d at 292. In reality, Mardanlou had suffered several burglary losses and had a policy cancelled by another insurer less than a year earlier. Id. Approximately ten days after receiving the homeowner's policy, Mardanlou sustained a loss due to a mysterious fire and made a claim under the policy. Id.

Upon discovery of the misrepresentations, the insurer filed a declaratory action seeking to rescind Mardanlou's homeowner's policy. Prudential's underwriting guidelines specifically

prohibited agents from binding risks where a prior policy cancellation had occurred within one year. Id. Mardanlou claimed that the court should utilize an "industry standard" to determine whether the misrepresentations were material. In affirming the trial court's ruling rescinding the policy, the Utah Supreme Court rejected Mardanlou's argument that the determination of whether the misrepresentations were material depended upon "industry standards," holding that such an argument was "without merit." Id.

Similarly, in Wisconsin Mortgage Assurance Corp. v. HMC Mortgage Corp., 712 F. Supp. 878 (D. Utah 1989) (applying Utah law), David Deuschle applied to HMC Mortgage for a residential loan. Based on the loan application and supporting documents, the mortgage company applied for and received mortgage insurance. HMC Mortgage then approved the loan. Id. Three months later, Deuschle defaulted on the loan. Id. During the subsequent investigation, HMC Mortgage discovered that Deuschle's "Verification of Present Employment" contained false information and the forged signature of his employer. Id. HMC Mortgage submitted a claim for the loss, and the mortgage insurance company informed HMC Mortgage of its intent to rescind the mortgage insurance. Id. In granting the mortgage insurance company's motion for summary judgment to rescind the policy, the Federal District Court held that the mortgage insurance company had "shown that the matter misrepresented was material to ***their*** acceptance of the risk. Thus, they are entitled to rescission." Id. at 882 (emphasis added).

The "materiality" of a "fact" stated in an insurance application should be determined based on whether the carrier involved would consider that "fact" important in its considering whether to assume the risk, and, if the risk is written, in determining the amount of premiums commensurate to that risk.

The age of the risk being insured is one of several critical factors used by Continental and

other insurance companies as a basis for computing premiums and determining the eligibility for various types of insurance.[3] As discussed more fully below, even Kingston's and DUC's own experts admit that older structures may not be built in accordance with modern era building codes. Such structures may have faulty wiring , lead paint, crumbling foundations, hand crafted and irreplaceable wood molding, or a whole host of other conditions which would affect the suitability of the risk and the premium needed to cover the known risks attendant to older structures.[4] According to Don Taylor, Kingston's and DUC's own expert, if given a choice, insurance carriers want to write newer risks, not older risks. R. at 1257-1262.

When considering the materiality of a fact misrepresented in an insurance application, appellate courts have consistently held that materiality can be determined as a matter of law, and that summary judgment is appropriate if the facts and evidence surrounding materiality are undisputed, and are so clear that reasonable minds could not differ. See e.g, Prudential Property & Cas. Ins. Co. v. Mardanlou, 607 P.2d 291 (Utah 1980) (misrepresentation of prior loss history and insurance history deemed to be material as a matter of law); Wisconsin Mortgage Assurance

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[3] It should be noted that from 1994 through the date of the fire, Kingston's insurance premium was set based upon his representation that the dwelling was built in 1990. Each year, Kingston's premium was decreased due to a "new home discount" on a structure which in reality was more than 100 years old. R. at 1553.

[4] Obviously, in repairing older structures, significant costs can be incurred in order to 1) replace/repair the damage, and 2) bring adjoining existing structural members up to current code requirements. Such costs would not be incurred on a newer structure which would merit a "new home discount." Following the fire, Continental learned that the Kingston structure had a number of existing deficiencies which would not be expected in a "new" home built in 1990, including non-metallic or "knob and tube" wiring in violation of modern electrical codes, no fire wall between the north and south sides of the structure, and pre-existing cracks in the foundation. See Affidavit of Chuck Hugo, R. at 439. Kingston's own experts agree that these are the types of items an insurer would have wanted to know in order to properly assess the risk and set premiums.

Corp. v. HMC Mortgage Corp., 712 F. Supp. 878 (D. Utah 1989) (applying Utah law, finding misrepresentation of employment history a material misrepresentation as a matter of law).

Courts in other jurisdictions have also acknowledged that materiality of a misrepresentation in an insurance application may be found *as a matter of law*. For example, the Supreme Court of New York, in a case involving misrepresentations of prior medical conditions on a life insurance application, stated as follows:

> Whether an applicant's misrepresentations are material is typically an issue of fact; however, where the evidence concerning materiality is clear and substantially uncontradicted, it is for the court to decide as a matter of law, especially when the misrepresentation substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken.

Kroski v. Long Island Savings Bank FSB, 689 N.Y.S.2d 92, 93 (1999) (internal citations and quotations omitted).

Courts have also been willing to find, as a matter of law, that an insured's misrepresentation of his/her age in the context of health and life insurance is material. See e.g., Dolan v. Mutual Reserve Fund Life Assoc., 53 N.E. 398 (Mass. 1899) ("[U]pon a policy for life we think it should be held, as a matter of law, that a material increase of age increases the risk."); see also Couch on Insurance 2d (Rev ed) § 37.32. Continental suggests that age in the context of health or life insurance is similar to the age of a dwelling or structure in the context of property and casualty insurance.

At least one Utah case, Eklund v. Metropolitan Life Ins. Co., 57 P.2d 362 (Utah 1936), also suggests that Utah courts would follow the reasoning applied by many other courts that issues of materiality may be decided as a matter of law where the evidence concerning materiality is clear. In Eklund, the insurance company denied coverage on two life insurance policies, claiming

that the insured had misrepresented her past medical history on her application for insurance. Id. at 363. The matter proceeded to trial, and at the conclusion of the insured's case, the trial court instructed the jury to return a verdict in favor of the insurance company. Id. On appeal, the Utah Supreme Court affirmed the judgment in favor of the insurance company, stating:

> If a representation is **material to the risk** and likewise knowingly false, it will be as potent for a rescission of the contract . . . .
>
> The respondent was justified in its refusal to pay the policies. **The evidence that the policies were obtained by misrepresentation being uncontradicted and it being possible to draw only one inference from it, there was presented a question of law for the court and not a question of fact for the jury.**

Id. at 367 (Internal citations omitted) (emphasis added).

In the present case, Continental contends that Kingston's misrepresentation of the age of his home was a ***material*** misrepresentation because Continental produced undisputed evidence that the age of the dwelling was an important factor in Continental's decision to issue the subject policy, and Appellant's own experts agreed that such information would undoubtedly be considered vital information to any insurance company evaluating a homeowners insurance application. In its original Motion for Summary Judgment, Continental relied primarily on the testimony of Continental's Underwriting Specialist, Kathleen Wentzel, who testified that, pursuant to its underwriting guidelines, Continental would not have issued the policy to Kingston had the true age of the home been disclosed in Kingston's insurance application. R. at 395-406. Continental argued that this evidence, which was undisputed, was sufficient to establish not only that Continental relied on the misrepresentation, but also that the misrepresented fact was material to Continental's decision to issue the policy.

The trial court, however, while agreeing that such evidence was sufficient to establish that

Continental relied on Kingston's misrepresentation, denied Continental's original Motion for Summary Judgment based on its conclusion that the issue of materiality "appears to be an issue of fact." R. at 770-772.

After additional discovery, including the depositions of five different individuals designated as insurance experts by Kingston and DUC, Continental renewed its Motion for Summary Judgment based on the fact that each of Kingston's and DUC's own experts testified clearly and unequivocally that the age or year of construction of a structure is a material fact that must be considered by an insurance company in deciding to accept a risk and issue an insurance policy. In fact, these experts repeatedly used emphatic words to stress the strength of their opinions concerning the materiality of the age of a structure. For example, Johnny Maestas testified that insurance carriers are "absolutely" concerned about the age of the structure they are insuring, and that the age of a structure was "absolutely" material to the insurance company's decision to assume a risk. R. at 1240-1241. Mr. Maestas also testified of his experience with insurance companies declining risks due to the age of a home. R. at 1235-1240. In fact, Mr. Maestas stated that had he been presented with a request to write an insurance policy on a home built in the 1800's, the transaction would have raised "a whole bunch. . .[of] red flags." R. at 1241.

Another one of Appellant's insurance experts, Jeff Rasmussen, testified unequivocally that the age of a home is an "important factor" to be considered by an insurance company. R. at 1246-1249. He stated that insurance companies "absolutely" want to know the accurate age of a structure before agreeing to write a risk. R. at 1247. Mr. Rasmussen's father, Ken Rasmussen, likewise testified that the age of a structure is "absolutely" one of the most important questions that an insurance company must have answered in the insurance application. R. at 1254-1255.

Don Taylor, another one of Appellant's experts, testified that he would be "scared to death" to bind coverage on a 1800's era dwelling without first advising the carrier that the structure had been built more than a hundred years ago because such a fact would be "very material" to an insurance carrier. R. at 1261-1262.

Despite this overwhelming evidence, both from Continental's personnel and from Appellant's own experts, that the age of a home is ***material*** to the insurance company, DUC and Kingston attempt to argue that Kingston's misrepresentation regarding the age of his home was immaterial because Continental will, under some circumstances, insure older homes. (See Appellants Brief at 25). They further assert that Continental's own underwriting policy directs that it agents could write policies on older homes if the plumbing, heating, wiring, and roofing have been upgraded. (Id.)

In making this argument, however, DUC and Kingston fail to mention the restrictions and conditions that Continental imposes for insuring older homes. For example, Continental requires that homes over 30 years of age be inspected prior to underwriting such risk. (R. 1567). Continental advises its underwriters to thoroughly examine the foundation, walls, stucco, rain gutters, chimney, steps, walkways, electrical, heating, plumbing, and prior insurance coverage before underwriting a home over 30 years old. (R. 1566-1578). There is no question that a home that is 100 years old will have significant material differences from a home built in 1990. Continental, however, was not put on notice that it needed to conduct a thorough examination of the home because Kingston informed Continental that the home was basically a new home.

It is also important to note that, even though Continental may insure older homes under some circumstances, the age of the home is still a material fact that is used to calculate the necessary premium to cover the increased risk of insuring an older home. Because the risks

associated with insuring older homes are obviously greater, Continental charges a substantially higher premium for older homes. (R. 1553). Rather than making any upward adjustments to Kingston's premium to reflect the fact that Kingston's home was more than 100 years old, however, Kingston's misrepresentation of the age of the home actually resulted in Kingston receiving a discount in premiums for what Continental believed to be a newly constructed home. This fact further establishes that Continental relied on Kingston's misrepresentation of the age of the home, and that the misrepresentation was, in fact, material not only to Continental's decision to insure the home, but also its determination of the appropriate premium.

While the issue of **materiality** may sometimes involve issues of fact, such is not the case before this Court. In addition to the undisputed subjective evidence provided by Continental's underwriting specialist, Kingston's and DUC's own insurance experts agree that a misrepresentation concerning the age of a structure, especially one constructed in the 1800's, is "absolutely" material throughout the insurance industry. In light of such testimony, there cannot be any factual dispute upon which a reasonable juror could conclude that Kingston's misrepresentation as to the age of his home was not material.

It is difficult to conceive of a more clear cut case of material misrepresentation than the one present in this case. The insurance application stated the year of construction as 1990 when in fact, it is undisputed that the Kingston home was constructed more than ***100 years earlier*** in the mid to late 1800's. The misrepresentation of the age of a home by more than 100 years compelled a finding, as a matter of law, that the misrepresentation was material to Continental's acceptance of the risk in 1994, and provides a valid basis for Continental to rescind its policy. Therefore, the trial court's grant of summary judgment in favor of Continental should be affirmed.

B. Kingston's Misrepresentation Was Not An Innocent Misstatement.

While Kingston and DUC acknowledge that the age of Kingston's home was misrepresented by more than 100 years, they attempt to avoid the consequences of that misrepresentation by suggesting that the misrepresentation was nothing more than an "*innocent misstatement*." In making that argument, Kingston and DUC incorrectly state that, under Utah law, "[a]n insurer cannot avoid a policy without proof the insured made a material misrepresentation of fact with intent to deceive," and that "false answers not knowingly made with intent to deceive do not justify recision." (Appellant's Brief at p. 22)

In Derbidge v. Mutual Protective Ins. Co., 963 P.2d 788 (Utah App. 1998), this Court looked at this very issue, and concluded that, while an insurance company cannot rescind a policy based on nothing more than an "innocent misstatement," the insurer is ***not*** required to prove that the misrepresentation was made with an intent to deceive. In looking at Section 31A-21-105(2), this Court noted that "an insurer may rescind a policy if any one of these three provisions is met: (1) the insurer relies on a material misrepresentation made by the applicant; (2) the insurer relies on a misrepresentation that was made by the applicant with the intent to deceive; or (3) the applicant's misrepresentation contributes to the loss." Id. at 790-91. While each of these three statutory alternatives require a showing of some misrepresentation, only one of the three requires that the misrepresentation be made with an "intent to deceive." Thus, according to the plain language of the statute, and contrary to Kingston's and DUC's argument, it is clear that the legislature did not intend to require a showing of intent to deceive.

In Derbidge, while this Court concluded that intent to deceive is not a required element, the Court did recognize a distinction between the terms "innocent misstatement" and

"misrepresentation," and concluded that an insurance company must prove that there was an actual misrepresentation, and not just an innocent misstatement. The Court's distinction between these two terms did not hinge on the applicant's intent, however, and instead focused simply on whether the applicant had knowledge of the true facts. The Court expressly stated that, "[a]lthough the outright **intent to deceive is no longer required in all cases**, requiring that an applicant have at least **some knowledge or awareness of her misstatement** is consistent with principles of insurance law enunciated after Utah enacted statutory standards for misrepresentation." Id. at 794 (emphasis added). This Court went on to state that "the policy justification for permitting rescission centers on the **applicant's knowledge of an undisclosed condition**, i.e., the **insurer is entitled to know what the applicant knows**, but cannot reasonably expect to know more by relying only on the applicant." Id. (emphasis added).

In the present case, Kingston has acknowledged that, at the time of the policy application, he knew the home had been built in the 1800's and not 1990. Kingston also has admitted that he knew the insurance application stated that the home was built in 1990. Since Kingston admits to having knowledge of the true facts surrounding the age of his home at the time of the insurance application, Kingston cannot not meet the criteria established by this Court for claiming that the misrepresentation was nothing more than an innocent misstatement. Kingston knew the actual age of the home, and Continental was entitled to that same knowledge. Since Kingston failed to disclose the true information to Continental, the inaccurate information in the policy application must be deemed to be a ***misrepresentation***, no matter what Kingston's intent may have been.

C. Kingston Cannot Avoid The Consequences Of His Misrepresentation By Blaming Christensen.

In another attempt to avoid the consequences of his misrepresentations, Kingston attempts

to shift the blame by alleging that Christensen made the misrepresentations in the policy application, and that Kingston should not be held responsible for Christensen's actions. This argument fails for at least two reasons. First, regardless of who actually wrote the false information in the application, Kingston attested to that false information when he reviewed the application, became aware of the misrepresentation, and signed the application. Second, the evidence in this case shows that Christensen was acting as Kinston's insurance agent, and not an agent of Continental, and therefore, it is Kingston, and not Continental, that would be bound by the actions of Christensen and the Jackson Insurance Agency.

1. Kingston Attested To The Accuracy Of The Statements In His Application By Signing The Application.

Kingston alleges that it was Christensen, and not Kingston, who filled out the application and incorrectly stated that the home had been built in 1990. Even assuming *arguendo*, that it was Christensen who wrote down the inaccurate information concerning the age of the home, Kingston, as a matter of law, is bound by the contents of his application once he signs it. By signing the application, Kingston is deemed to have knowledge of the application's contents, and thus, affirmed to Continental that the contents of the application were true and accurate.

Kingston has attempted to confuse the facts surrounding his review and signing of the application by giving sworn testimony and submitting multiple affidavits that repeatedly contradict each other as to the extent of Kingston's review of the application before signing it.[5] Despite Kingston's various attempts to claim that he was unaware of several of the

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[5] The trial court ultimately rejected Kingston's attempt to use multiple contradictory affidavits to establish a factual dispute by striking those portions of Kingston's affidavits that contradicted his original sworn testimony wherein Kingston acknowledged that he was given an opportunity to review the completed application before signing it, and that he did, in fact, spend several minutes reviewing the application in Christensen's office before he signed it.

misrepresentations contained in the application, Kingston does not dispute the fact that, at the time he signed the application, he knew that the age of the home was incorrectly stated in the application as 1990.

In a case involving Utah law, the Tenth Circuit Court of Appeals stated as follows:

> [W]here an applicant gives verbal responses to an insurer's agent, who then fills out the application, **the applicant has a duty to read the application before signing it and make certain his verbal responses have been correctly recorded**, and that in the absence of fraud, accident, misrepresentation, imposition, illiteracy, artifice or device (any which would reasonably prevent the applicant from reading the application before signing), the applicant, by his act of signing the application, "is, by law, conclusively presumed to have read the application and . . . **is bound by the contents thereof.**"

Jones v. New York Life & Annuity Corp., 985 F.2d 503, 508 (10th Cir. 1993)(applying Utah law)(emphasis added).[6] In reaching its decision, the Tenth Circuit relied on the Utah Supreme Court's holding in Theros v. Metropolitan Life Ins. Co., 407 P.2d 685 (Utah 1965).

In Theros, an applicant filled out a life insurance application with an insurance agent. The applicant later died and the beneficiary made a claim on the policy. The insurer claimed that the application contained material misrepresentations and that it would not have issued the policy had it known the truth. Subsequently, the insurance agent testified that he was the person who had initially inserted the false answers in the insurance application even though the deceased had given him truthful information. Like Jones, however, the applicant in Theros had signed the

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[6] In Jones, a life policy beneficiary brought suit against New York Life to recover benefits, claiming that the insurance agent had knowingly and negligently omitted certain health information from the application despite having personal knowledge of the truthful answers. There was a factual dispute as to whether the policy holder had fully and truthfully disclosed his medical history. It was undisputed, however, that the applicant did **not** read the application before signing it, and therefore, the Tenth Circuit reached its conclusion that the applicant and beneficiary were bound by the contents of the application. Jones, 985 F.2d at 504-508.

application without reading it. Id. at 686. Despite the testimony that the insurance agent had inserted false answers on his own initiative, the Utah Supreme Court upheld summary judgment for the insurance company based on the fact that the applicant had signed the insurance application and attested to its accuracy. Id. at 688.

In the present case, while Kingston denies being the source of the misrepresentation in the application, it is undisputed that Kingston was given the opportunity to read the insurance application before signing it. (R. 381-382). Kingston had a contractual and legal duty to read the insurance application and determine if there were any misstatements or errors contained in the application. When Kingston signed the application, he verified that the statements and representations contained therein were true and accurate. Therefore, irrespective of who inserted the misrepresentations, by signing the application, Kingston is bound by the misrepresentations, and the trial court correctly concluded that Continental was entitled to summary judgment.

2. Christensen's Alleged Negligent Advice Does Not Bind Continental.

Kingston alleges that when he reviewed the application, he informed Christensen that the home had not been built in 1990, and that Christensen responded by claiming that as long as certain updates had been made to the home they could simply put the date of the updates as the "year built" rather than the year of the original construction.[7] While Christensen denies that he ever made such a statement to Kingston, this factual dispute is immaterial since Christensen was acting as Kingston's agent at the time of the application, and therefore, Kingston would be bound

[7] Kingston makes this allegation despite the fact that the policy application also asked for the following information: "If [the home] is over 29 years old, provide year updates were made: Heating _____ Plumbing _____ Wiring _____ Roof _____." R. at 23. This portion of Kingston's application was left blank.

by the acts of Christensen. Contrary to Kingston's allegation that Christensen was a captive agent of Continental, the undisputed facts show that Christensen was an independent insurance broker who was acting on behalf of Kingston. The Utah Supreme Court recently found that the issue of whether an insurance salesman is an agent for the insured, or an agent for the insurance company, may be properly resolved as a matter of law. Calhoun v. State Farm Mutual Automobile Ins., 2004 UT 56, 203 Utah Adv. Rep. 46, 2004 Utah LEXIS 125, at 27 (Utah 2004).

Under Utah law, an independent insurance broker who is not a captive agent cannot bind an insurance company by his or her mistakes. See Vina v. Jefferson Insurance Company, 761 P.2d 581, 583-85 (Utah Ct. App 1988); Van Der Heyde v. First Colony Life Ins., 845 P.2d 275, 277 (Utah Ct. App. 1993) (finding that an independent insurance broker is an insurance agent who procures insurance for insureds from more than one insurance company). In Vina, the Utah Supreme Court noted that:

> An insurance broker, like other brokers, is primarily the agent of the first person who employs him and is therefore ordinarily the agent of the insured as to matters connected with the procurement of the insurance. Further, an independent agent who solicits insurance for the insured and places that insurance with an insurance company is, if anyone's agent, the agent of the insured and not of the insurance company.

Vina, 761 P.2d at 585.

In the present case, Christensen was acting as an independent insurance broker at the time he procured insurance for Kingston. He was not the captive agent of Continental because he wrote insurance for a number of other insurance companies in addition to Continental. R. at 579. Brent Christensen did not have an exclusive agency relationship with Continental. He was an independent broker who solicited insurance for the insured and placed the insurance with one of many companies depending on the insured's needs and circumstances. Therefore, "if anyone's

agent, [Christensen was] the agent of the insured and not of the insurance company." Vina, 761 P.2d at 585. Accordingly, even if the misrepresentations in the application were a result of Kingston relying on Christensen's advice, Continental cannot be bound by Christensen's mistakes or incorrect advice. Furthermore, because Christensen was acting as Kingston's agent, and not Continental's agent, Kingston argument that facts known to Christensen were imputed to Continental should likewise be rejected.

II. CONTINENTAL DID NOT HAVE AN AFFIRMATIVE DUTY TO INSPECT THE HOME BEFORE INSURING IT.

Kingston and DUC also attempt to argue that Continental cannot be found to have reasonably relied on the misrepresentation concerning the age of the home because Continental had a duty to inspect the home prior to issuing the policy, and therefore, should have discovered that the age of the home had been misrepresented in the application. The only authority cited by Appellants in support of such a duty to inspect is State Farm Mutual Auto Ins. Co. v. Wood, 483 P.2d 892 (1971). The Wood case, however, is easily distinguishable from the present case, and there is no authority suggesting that an insurance company always has a duty to inspect before issuing any type of insurance policy.

The primary distinction between Wood and the present case is the fact that Wood dealt with an automobile liability insurance policy. In Wood, State Farm had attempted to rescind an automobile liability policy after an accident when it discovered that the insured had made several misrepresentations in his application regarding his driving record and prior revocation of his drivers license. Id. at 893. The Utah Supreme Court noted that the misrepresented information would have been available to State Farm in public records available at the Department of Public Safety. The Court concluded that State Farm owed a duty to the insured and the public to make a

reasonable investigation into the insured's insurability within a reasonable time after accepting the application. Id. There is nothing in the Court's opinion, however, that suggests that the Court's holding would extend to other types of insurance.

There are several reasons for limiting the Court's holding in Wood to cases involving automobile liability insurance. Automobile liability insurance, unlike other types of insurance, is statutorily required for all drivers in the state of Utah, and is intended to protect not only the insured, but also the general public. This distinction was a key factor in a California case that was cited by the Utah Supreme Court in support of its holding in Wood:

> The requirement that the carrier act promptly to determine insurability after issuance of an automobile liability insurance policy inures **primarily to the benefit of those members of the public who suffer injury from negligent motorists and seek recovery against the responsible tortfeasors. The duty arises from the public policy that protects the innocent victim of the careless use of automobiles from an inability to sue a financially responsible defendant. This duty, which the insurer incurs with the issuance of an automobile liability policy, therefore runs directly to the class of potential victims of the insured.** Consequently, when the insurer breaches that duty, it may not defeat recovery by the injured person, who has recovered a judgment against the insured, by relying on an untimely attempt to rescind.

Barrera v. State Farm Mutual Automobile Ins. Co., 456 P.2d 674, 685-86 (Cal. 1969) (emphasis added).

Because automobile liability insurance is mandated by statute and is intended to protect the public, there is a logical basis for requiring insurance companies to investigate the insurability of an individual before issuing a policy. That same logic, however, does not apply to other types of insurance such as homeowners insurance. Appellants have failed to cite a single authority suggesting that a homeowners insurer has a similar affirmative duty to investigate the representations made by an insured in an application for insurance.

Continental contends that recognizing such a duty in cases like this would allow the insured to escape any liability for making misrepresentations in the application. For example, an applicant for life insurance could intentionally or knowingly fail to disclose serious past medical conditions in his application, and so long as the insurance company does not do a complete independent investigation into the applicant's medical history, the applicant could later claim that the insurer breached its duty to investigate, and is therefore, estopped from attempting to rescind the policy. Under such a scenario, the applicant escapes all liability for his misrepresentation.

That is precisely the type of scenario that Appellants are trying to create in this case. Continental, however, had absolutely no reason to question Kingston's representation in the application that the home had been built in 1990. As noted above, had Kingston accurately disclosed that the home was more than 100 years old, or even just 30 years old, Continental's own underwriting guidelines would have required that the home be inspected before the risk could be insured. Because Kingston represented that the home was virtually a new home, however, there was simply no reason to inspect the home, and there was no reason to question the truthfulness of Kingston's representation. Therefore, the Court should conclude that Continental did not have a duty to inspect the home prior to the loss.

III. THE TRIAL COURT DID NOT ERR IN DENYING DUC'S MOTION FOR SUMMARY JUDGMENT BECAUSE CONTINENTAL DID NOT WAIVE ITS RIGHT TO RESCIND.

DUC and Kingston argue that the trial court erred in denying DUC's Motion for Partial Summary Judgment. The Motion was never joined into by Kingston. R. at 290-291. The gravamen of the argument on appeal is that Continental waived its rights of rescission by 1) failing to rescind the insurance contract after an independent adjuster inspected the fire damage and 2) renewing Kingston's policy in March 1998. Appellants' Brief at 18-20. DUC and

Kingston request that this court find "a waiver of any right to rescind the policy as a matter of law." Id.

As stated above, the underlying Motion for Partial Summary Judgment which is one basis for the present appeal was filed solely by DUC. DUC was never a party to the insurance contract. In fact, Kingston admits that he never told Christensen or the Jackson Agency about DUC's interest in the property. R. at 13-26, 195. The application does not list DUC as a lien holder. R at 23. Since DUC was not a party to the contract, DUC lacked standing in the first instance to file the Motion and lacks standing now to pursue this point on appeal.[8] It is fundamental law that only parties to a contract have a right to sue for their enforcement. Wagner v. Clifton, 62 P.3d 440, 442 (Utah 2002). Under certain circumstances, intended third party beneficiaries may also have rights to bring suit. Id. at 441. In this case, DUC was not a third party beneficiary.[9]

Even if DUC had standing to perfect this issue on appeal, the trial court's ruling denying the Motion for Partial Summary Judgment on waiver was correct. The essence of Continental's Motion for Summary Judgment was that, due to the policy application misrepresentations made by Kingston, the policy was void *ab initio*. In other words, once a material misrepresentation is established, the law treats the policy as having never been issued or in existence. Without the existence of an insurance contract, there can be no waiver as a matter of law. Furthermore, DUC

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[8] Issues of standing are jurisdictional and may be raised at any time during the judicial process. Salt Lake City Corp. v. Property Tax Division, 979 P.2d 346, 350 (Utah 1999); Olsen v. Salt Lake City Corp., 724 P.2d 960, 964 (Utah 1986).(standing is a jurisdictional issue which may be raised at any time on appeal)

[9] DUC may claim that they are the assignees of Kingston's rights under an assignment dated May 21, 2001. R. at 847, 848, and 1828. However, as an assignee, DUC stands in the shoes of Kingston. DUC has no greater rights than does Kingston. In the present appeal, Kingston did not file a Motion for Summary Judgment for waiver in the court below. As such, he has no claim of error on appeal to a motion which was never filed.

made no showing to establish a claim of waiver in the court below.

A. DUC Failed to Establish Any Waiver before the Trial Court.

Appellants claim that the trial court should have granted DUC's Motion for Partial Summary Judgment on the issue of waiver.[10] Appellants' Brief at 18-20. The trial court did not err in denying DUC's Motion for Partial Summary Judgment.

Waiver, like estoppel, is an equitable remedy which is normally tried to the bench. Tolboe Const. v. Staker Paving & Const., 682 P.2d 843, 849 (Utah 1984). See also, Boehringer v. Allianz, 1998 US App LEXISA 25434 (9th Cir. 1998). As such, trial courts' findings on equitable claims are not to be reversed unless they are "against the weight of the evidence," thus making them "clearly erroneous." Mckay v. Hardy, 896 P.2d 626, 629 (Utah 1995). In the present case, DUC presented its evidence of waiver to the trial court and the trial court found no waiver and denied DUC the affirmative equitable relief it sought. That ruling should not be disturbed on appeal.

Four elements must exist for the defense of waiver to be successful. The elements are: (1) the existence at the time of the waiver of a right, benefit or advantage; (2) the actual or constructive knowledge of that right at the time of the waiver; (3) the **intention** to relinquish the right; and (4) the relinquishment must be clearly intended and distinctly made. Geisdorf v. Doughty, 972 P.2d 67, 72 (Utah 1998). The Utah Supreme Court has admonished lower courts to be "especially careful..and cautious" in finding implied waiver. Id. In fact, the court has clearly indicated the difficult burden in establishing a prima facie case of waiver where the waiver is

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[10] It is important to note that DUC's responsive pleading contained no prayer for affirmative relief. R. 170-174. Kingston's affirmative claims against Continental were for Breach of Contract and Breach of the Implied Covenant of Good Faith. R. at 139-150.

"implied by conduct or silence." Id.

Appellants argue that the renewal of the policy constitutes a waiver of Continental's right to rescind or void the policy. However, DUC's motion in the court below failed to establish a prima facie case of waiver. The trial court correctly found that DUC provided "no facts"to support its claim "that Continental intended to relinquish its right to void the policy. R. at 771. On appeal, Appellants still fail to establish any knowing and intended relinquishment of the right to void the subject policy.

In fact, the evidence before the trial court was clear and unchallenged: Continental did not knowingly or intentionally intend to waive its right to rescind. Prior to filing suit, Continental advised Kingston of its express reservation of rights to investigate the loss and to challenge coverage in a letter dated January 9, 1998. R. 2924 at pp. 18-19. Kingston did not appear for his examination under oath until January 19, 1998. Id., at 19. Not until January 19, 1998, did Continental learn from Mr. Kingston himself that the home had been built in the 1860's and that he had no prior insurance on the home. R. at 425, 432, 446-456. Continental's building code expert did not inspect the property and establish that the home as designed for multiple family use until March 12, 1998. Id., at p. 20. This March 12, 1998 inspection revealed that the structure was designed as a triplex and had, in fact, three separate electrical meters.[11] R. at 392. On March 13, 1998, Continental sent to Kingston a reservation of rights letter setting forth its defenses to

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[11] Continental on or about June 29, 1999 obtained an affidavit from the Bountiful City Assistant Fire Marshall, Michael Barfus. R. 387-389. Mr. and Mrs. Kingston advised Mr. Barfus that a Mary Keaton "rented" the north half of the main floor. Mr. Kingston had earlier denied that any other women had lived in the home, other than his wife and daughters. R. 446-456. Furthermore, the utilities on the north side of the Kingston home were listed or paid for in the name of Mary Keaton, not Joseph Kingston. The utilities on the Kingston's side of the Residence were handled completely separate from Ms. Keaton's. (See Mountain Fuel receipts and check copies, R. at 477-482.)

coverage.[12] R. at 2924 at pp. 18-19. Continental then filed suit that same day, March 13, 1998, claiming the right of rescission. R. at 1- 96. The Complaint clearly and unambiguously indicates Continental's intent to void or rescind the contract, if Continental could establish Kingston's misrepresentations were material. No one could mistake Continental's intentions after reviewing the reservation of rights letter. No one could mistake Continental's intentions after even a cursory reading of the Complaint against Kingston. Nothing could be more clear than Continental's intent **not** to waive its right of rescission. All of these unmistakable actions took place prior to any renewal.

Moreover, Kathleen Wentzel, in her unopposed and uncontradicted affidavit, explained why the policy was allowed to be renewed. She testified that Continental did not intend, by renewing the Kingston policy until a final judgment was obtained, to waive any right to rescind or void the policy. (R. 473-475) Rather, the renewal was merely the product of Continental's practice of not voiding or canceling a policy which is the subject of litigation to allow protection to a putative insured and the public. (Id.).

DUC and Kingston cite Farrington v. Granite State Fire Ins. Co., 232 P.2d 754 (Utah 1951) in support of a waiver. Farrington is easily distinguished from this case. First, the Farrington court's discussion of waiver is merely dictum and is not controlling. The court in Farrington stated "there is another subject which, **while not controlling in the case**, perhaps

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[12] This letter indicated in part, that Continental's investigation "into this loss is done with a full reservation of rights. Furthermore, any payments made...previous to this date for the loss were made with a full reservation of rights....The fact that [Continental] has investigated this loss and will continue its investigation and adjustment of the loss shall not bee [sic] deemed to constitute a waiver of [sic] [Continental's] right to later deny coverage for the loss." The letter further explained that due to the unusual circumstances, Continental would continue to reimburse Kingston, as though the policy were in force, until such time as Continental "determines that it has or had no obligation to provide coverage to Mr. Kingston or others." See, Addendum 1.

should be mentioned. That is, the matter of waiver by acceptance of premiums." Id. at 118 (emphasis added). Additionally, Farrington held that there was no evidence that a misrepresentation had even been made by the insured in that case.

In the case at hand, the undisputed evidence is that Continental, after discovering and uncovering the material misrepresentations made by Kingston, acted with reasonable promptness in claiming its right to rescission. It is undisputed that Continental clearly and unequivocally, prior to any renewal of the policy, made its intent known to Kingston to void or rescind the policy after obtaining a judicial determination of Continentals' rights and duties under that policy.

Appellants rely on 44 Am. Jur. 2d Insurance § 1649 which states, "An insurer which, with knowledge of facts entitling it to treat a policy as no longer in force, receives and accepts a premium on the Policy, is estopped to take advantage of the forfeiture." Appellants fail to cite the following statement in that same section of Am Jur which states, "[The insurer] cannot treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring." Thus, this authority, at best, stands for the proposition that an insurer may not void a policy for a subsequent loss where it has accepted premiums with the knowledge of facts entitling it to rescission.

Courts have held that the principles of estoppel and waiver do not operate to extend coverage after a loss has already been sustained. American Hardware Mut. Ins. Co. v. BIM, Inc., 885 F.2d 132, 140 (4th Cir. 1989); Sellers v. Allstate Insurance Co., 82 F.3d 350, 353 (10th Cir. 1996); St. Paul Fire and Marine Ins. Co. v. Albany County School Dist., 763 P.2d 1255, 1261 (Wyo. 1988); Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384, 390 (Colo. Ct. App. 1985); 16 Appleman, Insurance Law and Practice, 629, 630 (1944). In this case, Appellants improperly sought to create coverage out of the post loss conduct of Continental when, in fact,

that policy was void *ab initio*. At best, Continental's post-loss conduct might create an equitable claim of promissory estoppel.[13]

In the present case, the undisputed evidence before the trial court was that Continental did not intentionally relinquish its right to rescind its policy. In fact, Continental, within a reasonable time after acquiring knowledge about Kingston's material misrepresentations, notified Kingston of its intent to void or rescind the policy before any renewal occurred. The continuation of the policy to protect Kingston and DUC's interests, as well as the public, in an uninsurable structure was in no way an intentional relinquishment of Continental's right to rescission.

The undisputed facts in this case demonstrate that Continental acted with reasonable promptness after notice of the loss to notify Kingston of its claimed right of rescission. Within 60 days of taking Mr. Kingston's examination under oath, Continental sent a reservation of rights letter and filed suit indicating clearly an intent to defend against his claim based upon his application misrepresentations. For any court to find as a matter of law that a waiver has occurred under these facts would effectively negate any insurer's ability to investigate while simultaneously seeking seek judicial guidance in the form of a declaratory action.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT NOTWITHSTANDING DUC'S DEFENSE THAT CONTINENTAL WAS ESTOPPED FROM DENYING COVERAGE

DUC opposed Continental's renewed Motion for Summary Judgment by asserting the

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[13] In claims of promissory estoppel, damages are limited to those sustained consistent with "the extent of the reliance." Andreason v. Aetna Casualty & Surety Co., 848 P.2d 171 (Utah Ct. App. 1993) In other words, if Kingston were to be found to have spent 15 hours in creating a proof of loss in detrimental reliance on his belief that he had coverage, his affirmative claim against Continental for promissory estoppel would allow him to recover the reasonable value of his time, not create coverage for the damage to his house. However, Kingston made no such affirmative claim below.

affirmative defense of estoppel. R. at 1435-1437. The issue is again raised on appeal. Appellants' Brief at 33-35. While closely akin to the doctrine of waiver, promissory estoppel consists of:

> (1) a promise reasonably expected to induce reliance; (2) reasonable reliance inducing action or forbearance on the part of the promisee or a third person; and (3) detriment to the promisee or third person.

Weese v. Davis County Comm'n., 834 P.2d 1, 4 n.17 (Utah 1992).

Appellants cite "two sequences of events" as presenting at least jury issues on the defense of estoppel. First, Christensen's alleged statement that "it was proper to prepare the application by giving the year of the home's remodel as the home's age." Id. at 34. Second, Continental's actions after the loss. Id. Each of these "sequences of events" fails to support a claim of estoppel against Continental's right to rescind the policy based upon Kingston's misrepresentations.

With respect to the claim that Christensen's statements create a basis to estop Continental from relying on Kingston's misrepresentations, Appellants disregard the clear wording and effect of Theros, 407 P.2d 685 (Utah 1965). In Theros, the insurance agent admitted that he inserted the false information into the application. In affirming summary judgment for the insurance carrier on the basis of material misrepresentation, the Utah Supreme Court affirmed that the applicant who signed the application and falsely attested to its accuracy was bound. Id. at 688. As between Continental and Kingston, any purported conduct on the part of Christensen cannot create a basis for estoppel where Kingston knowingly and voluntarily signed the application. Second, as demonstrated *supra*, Christensen was Kingston agent, not Continental's during the application process. Third, the statements of Kingston concerning his conversations with Christensen were introduced by means of affidavit and the trial court found his affidavit inconsistent with his prior examination under oath and deposition testimony and struck the affidavit. R. at 770-772.. On

appeal, the Docketing Statement indicated that Appellants might challenge the trial court's striking of Kingston's inconsistent affidavits. Appellants' Brief does not raise this issue on appeal. Any claim now that the trial court's action in striking Kingston's affidavits was in error must be disregarded.

With respect to Continental's actions post loss creating a basis for estoppel, Appellants' claim also fails. No where in Appellants' recitation of the facts is there reference to any promise to extend coverage made by Continental. In stead, Kingston claims he had to hire a contractor to do demolition, had to pay his house payments, had to submit to an examination under oath, and had to prepare a proof of loss. First, the demolition work was paid for by Continental. R. at 1880. Second, Kingston was under a legal obligation to pay his house payments. Appellants admit that Continental paid for Kingston's moving expenses and additional living expenses at least through the time of the filing of the underlying declaratory judgment action. R. at 1881. Third, the acts of submitting to a requested examination under oath under a stated reservation of rights cannot be said to be an act inconsistent with Continental's right to claim rescission. Fourth, Continental's request that Kingston submit a proof of loss to document that he claimed coverage for his loss is likewise not inconsistent with an insurance carrier's right to later determine that coverage is either not available due to an exclusion or a policy which is void. As previously stated, courts recognize that the doctrine of estoppel cannot afford coverage after a loss where no coverage existed at the time of the loss. Unlike in Andreason, Appellants' counterclaims against Continental did not include any affirmative claims of promissory estoppel for damages sustained in reliance on Continental's actions. As a result, the trial court committed no error in disregarding and denying relief based upon Appellants' affirmative defense of estoppel.

V. THE TRIAL COURT DID NOT ERR IN ADMITTING KATHLEEN WENTZEL'S AFFIDAVIT AND BRENT CHRISTENSEN'S TESTIMONY.

DUC and Kingston argue that the trial court erred by admitting the testimony of Continental's underwriting expert, Kathleen Wentzel, simply on the basis that she did not personally handle Kingston's application. Appellants likewise argue that the trial court impermissibly considered statements made by Brent Christensen, Kingston's insurance agent, and party to the underlying suit. As demonstrated below, the trial court correctly admitted such evidence.

While Kingston and DUC rely on the standard of review pertaining to the admission of testimony by lay witnesses, Continental maintains that Ms. Wentzel was an expert witness, and therefore, a different standard of review must be applied. The review of the admission or consideration of expert testimony by a court below is governed by an abuse of discretion standard. The Utah Court of Appeals has "'repeatedly recognized that trial courts have considerable discretion over the admission of expert testimony.' Thus, making determinations as to who qualifies as an expert witness and the admissibility of the witness's testimony fall within the discretion of the trial court." E.B. v. State, 53 P.3d 963 (Utah Ct. App. 2002)(quoting In Re G.Y., 962 P.2d 78, 83 (Utah Ct App. 1998)). Absent a clear abuse of this discretion, this Court should not reverse the trial court's evidentiary determinations.

A. The Trial Court Properly Admitted Kathleen Wentzel's Statement.

Kathleen Wentzel's affidavit and deposition testimony were considered by the trial court as evidence of the materiality of the misrepresentations contained in Kingston's insurance application, as well as the existence and effect of Continental's underwriting guidelines. DUC

and Kingston argue that the trial court committed reversible error by admitting her testimony, but do not cite to any portion of the record where the objected to testimony "was identified, offered, and received or rejected." Absent such a citation to the record, this claim of error is waived. See Utah R App Proc., Rule 24(e).

DUC and Kingston claim that "a witness" may not testify unless the witness has personal knowledge of this specific case. This argument ignores the fact that Ms. Wentzel was an expert on Continental's underwriting policies and practices. DUC and Kingston cite Rule 602 of the Utah R. Evidence which states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." However, Rule 602 also clearly states that "[t]his rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

Rule 703 of the Utah Rules of Evidence provides that if a witness is an expert on the matter, such witness may testify based on facts which are proffered to the expert at or before a hearing. The expert's opinion may be based solely on evidence gathered in preparation for the case so long as the materials are of a type usually relied upon by experts in his or her field. See American Concept Ins. Co. v. Lochhead, 751 P.2d 271 (Utah Ct. App. 1988).

Ms. Wentzel has been an underwriting specialist for Continental for over ten years. She has worked in the insurance underwriting department at Continental for more than sixteen years. She is very familiar with Continental's policy guidelines. (R.1214-1225; R. 509-510). Ms. Wentzel was also deposed by DUC and Kingston regarding her extensive knowledge of the underwriting practices and guidelines used by Continental. During her deposition, she stated that Continental would not have insured a home built in the 1800's but for extremely limited circumstances which did not apply in this case. R. at 395-406. Furthermore, she stated that

Continental would not have insured the Kingston home had it known that the home had not been previously insured, or that it was being used as a multi-family dwelling without the proper fire walls. Id.. Ms. Wentzel's deposition was taken as a 30(b)(6) deposition and she was designated by Continental as its testimonial witness on underwriting practices. Id. Ms. Wentzel' experience and expertise qualified her to testify as to Continental's policies and practices, as well as to the effect a full disclosure of the age of the home, its multi-family characteristics of the home, and the fact that the home had not been previously insured would have had on Continental's decision to write the policy for Kingston. The trial court did not abuse its discretion under Rule 703 of the Utah Rules of Evidence in admitting such evidence.[14]

B. The Trial Court Properly Admitted Brent Christensen's Statements.

DUC and Kingston argue that the trial court improperly admitted certain statements of Brent Christensen "that Kingston did not inform him of the home's age." See Appellants' Brief at 39. DUC and Kingston do not cite to any portion of the record where the objected to testimony

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[14] DUC and Kingston assert that the refusal of the trial judge to strike Ms. Wentzel's Affidavit should be judged by a "clearly erroneous" standard. Even under such a standard, "an erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful. State v. Villarreal, 857 P.2d 949, 957 (Utah Ct. App. 1993), aff'd, 889 P.2d 419 (Utah 1995). An error is harmful if it is reasonably likely that the error affected the outcome of the proceedings. "In other words, 'for an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.'" Id. at 958 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)). Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372 , 1378 (Utah 1995). In this case, the materiality of Kingston's misrepresentation was testified to by his own experts. Thus, DUC and Kingston cannot show a "sufficiently high" likelihood of a different outcome even if Ms. Wentzel's testimony were to be excluded. This is further supported by the fact that Continental also submitted an affidavit from Kathy O'Rourke which offered substantially identical testimony and opinions. See, R. at 701-704. Ms. O'Rourke was the underwriter who personally handled Kingston's application.

"was identified, offered, and received or rejected." Absent such a citation to the record, this claim of error is waived. See Utah R App Proc., Rule 24(e). Instead, Appellants cite only generally to testimony evidencing Christensen's difficulty in recalling certain specifics of his dealings with Kingston. See Appellants' Brief at 39.

In the court below, Christensen's testimony was presented via deposition and affidavit. See R. at 576-598, 684-686. Christensen's testimony included the following statements: 1) that it was his practice to accurately record information provided by insurance applicants; 2) that no applicant has ever told him that their home in Utah was built in the 1800's; 3) that he has never told an applicant that "as long as remodeling work is done to code, the remodeling date could be used for the age of the residence;" 4) that he has never supplied fictitious information in any application for insurance; and 5) that it has been his practice to always have an applicant review and sign the application for insurance. Id.

There was no basis to strike Christensen's affidavit or deposition testimony simply because he did not recall certain specifics of a prior meeting or conversation with Kingston. The trial court did not err by denying the Motion to Strike and admitting his testimony as to his general insurance practices. The trial court's action in allowing Christensen's testimony to stand concerning his business practices was correct. Rule 406 of the Utah Rules of Evidence specifically permits such habit or routine practice evidence:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Christensen was certainly competent to testify that it is his practice to accurately record the information given to him by insurance applicants, and that if an applicant had mentioned that his

home had been built in the 1800's, such a communication would have raised a "huge red flag," that in response to such a statement, he would have switched directions and attempted to place coverage with another insurance carrier, and that such a statement "would stick out like a sore thumb" in his memory. See R. at 576-598. Such testimony was based on his personal knowledge and practice, and was properly before the trial court. While DUC and Kingston's assertion that Christensen had difficulty in recalling certain facts may provide some basis for attacking Christensen's credibility or the weight to be given to his testimony, the record before the trial court did not support DUC and Kingston's Motion to Strike Christensen's testimony.

Of equal importance in reviewing whether the trial court's ruling created any prejudicial reversible error is the fact that Continental's Motions for Summary Judgment did not cite to nor rely upon Christensen's testimony. See R. at 356-360, 603-609, 610-620, and 1172-1182.[15] The absence of any reliance by Continental upon Christensen's testimony renders any consideration of trial court error in ruling upon the Appellants' Motion to Strike moot.

VI. THE AWARD OF COSTS SHOULD BE AFFIRMED.

DUC and Kingston contend that the trial court erred by awarding Continental costs for depositions and witness fees. Deposition costs may be properly recovered so long as the trial court finds that the depositions were not taken in bad faith and the depositions appeared to be essential for the development and presentation of the case. Young v. State of Utah, 16 P.3d 549,

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[15] Continental did include one citation to Christensen's testimony in Plaintiff's Memorandum in Opposition to Defendant D.U. Company's Motion for Partial Summary Judgment. See R. at 420. This reference and citation to Christensen's deposition transcript states merely, "The insurance agent, Brent Christensen testified that the contents of the Application were based upon Kingston's answers." Even under a clearly erroneous standard, DUC and Kingston cannot show that any error in admitting this statement would have "reasonably likely"affected the outcome of the proceedings. Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372 , 1378 (Utah 1995).

551 (Utah 2000). Furthermore, deposition costs may be recovered even if the depositions were not used at trial so long as it is shown that the deposition costs were "necessary and reasonable where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive method of interrogatories, requests for admissions, and requests for the production of documents." Id. at 551-52.

On appeal, an award of deposition related costs should be affirmed if there is a showing that: (1) the depositions were taken in good faith, and (2) the depositions were essential to the case because the same information could not be obtained through less expensive means of discovery. Id. at 552. Continental contends that the costs awarded in this case meet these requirements.

The awarded deposition costs were listed in the Memorandum and Affidavit of Costs and Disbursements submitted to the trial court. R. at 2546-2551. DUC and Kingston did not argue below that the depositions were taken in bad faith. Rather, DUC and Kingston argued that the depositions were not necessary, and that the information obtained in the depositions could have been obtained by other, less expensive means. Thus, the sole issue on appeal is whether the deposition transcript costs and statutory witness fees were necessarily incurred in the most cost effective manner. There are numerous factors suggesting that the depositions were not only necessary, but the only effective means to obtain the information needed to prepare the case for summary judgment. In addition, most of the deponents were not parties to this action, and therefore, contrary to Appellant's argument, this discovery could not have been obtained through interrogatories, admissions, or requests for production of documents.

The primary justification making these depositions necessary was the fact that Continental, in good faith, believed that the trial court would be able to resolve this matter via summary judgment in light of the numerous misrepresentations in the insurance application, including the

gross misrepresentation of the home's age. Accordingly, the case needed to be developed in a manner which allowed the relevant facts to be appropriately presented to the trial court as required by Rule 56 of the Utah Rules of Civil Procedure. Such depositions were necessary to establish the undisputed facts relied upon by the trial court on its numerous summary judgment rulings in favor of Continental. By obtaining these depositions upon which Continental's summary judgment motion was based, Continental avoided the much more expensive prospect of going to trial.

A second important factor supporting the trial court's award of costs is that many of the depositions were necessitated by the resistance Continental met at nearly every turn in trying to conduct less expensive means of discovery. The incessant attempts by DUC, Kingston, and Kingston family members to maintain a shroud of secrecy over their dealings made it extremely difficult to obtain discovery through less expensive means. Such is evidenced by the various Motions to Compel that Continental was forced to bring even in response to the simplest of discovery requests. See R. at 190-192, 1091-1093,1380-1382. The failure or refusal of DUC , Kingston and other witnesses to cooperate with discovery in an attempt to avoid disclosure of their family and business practices made it virtually impossible to obtain discovery through less expensive means of written discovery.

Third, it is also important to note that many of the depositions at issue were of non-parties or experts retained by DUC and Kingston. In such cases, less expensive means of discovery were not available. Therefore, it was necessary to depose these witnesses to prepare the Motions for Summary Judgment, and if necessary, to prepare for trial.

For purposes of demonstrating the necessity of the depositions at issue, Continental offers

the following justification for the costs of each deposition in this case[16]:

Brent Christensen: Christensen is a party in this litigation, and this deposition was noticed up and taken by Kingston and DUC.

Elaine Crossley and Verl James Johnson: Ms. Crossley and Mr. Johnson are both employees of DUC. Both were involved in the alleged real estate transaction where DUC allegedly transferred DUC's interest in the Bountiful home by means of an unrecorded real estate contract to Kingston. These depositions were necessary to gather evidence on the ownership of the subject property, as well as the identity of secured parties claiming an interest in any potential insurance proceeds on the structure.

Paul Capehart and Kathleen Wentzel: Mr. Capehart and Ms. Wentzel were both employees of Continental who were involved in the investigation and handling of the Kingston claim. These depositions were noticed up and taken by Kingston and DUC. These depositions were instrumental in establishing the issues of misrepresentation and materiality for Continental's successful Motion for Summary Judgment.

Luana Kingston: Luana Kingston is Joseph Kingston's wife who resided in the home at the time of the fire. Luana is not a party in this litigation. Luana's deposition was necessary to determine who was residing in the two sides of the house at the time of the fire for purposes of supporting Continental's claim that Kingston misrepresented the fact that the home was a single family dwelling. Luana's deposition was also necessary for determining the scope of the fire and

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[16] Continental erroneously included a claim for reimbursement of $293.75 for the sworn statement of Ms. Stacey Kingston. While Ms. Kingston's sworn statement was taken, such costs would be better classified as part of Continental's informal investigatory efforts, rather than a deposition upon notice to the parties. Thus, Continental agrees that the costs associated with her sworn statement should not have been awarded.

alleged property damage.

Joseph Kingston: Joseph Kingston is a party to this litigation. His deposition was necessary for gathering information on virtually every issue presented in this case. Furthermore, his deposition was necessary in light of the numerous inconsistencies contained in his insurance application, his examination under oath, and his several affidavits furnished throughout this litigation.

Tyler Anderson, Jeffrey Rasmussen, Ken Rasmussen, Johnny Maestas, and Don Taylor: Each of these individuals are insurance agents who were designated by DUC and Kingston as their experts on the materiality of Kingston's misrepresentations concerning the age of the structure. Their depositions were necessary for determining what expert opinions they would offer at trial. In addition, the testimony of these experts was instrumental in Continental's successful summary judgment arguments that Kingston's misrepresentations regarding the age of the home were *material.*

Mary Keaton Brown: Ms. Brown, believed to be the married daughter-in-law of Joseph Kingston, lived with her two children on the north side of the structure in July 1997. During Kingston's examination under oath, he failed to disclose her as being a resident of the home at the time of the fire. R. at 2063. Thus, her deposition was necessary for purposes of supporting Continental's claim that Kingston misrepresented the fact that the home was a single family dwelling, and for determining the scope of the fire and alleged property damage.

Steven Nickel: Mr. Nickel is an independent appraiser that was hired by Continental to investigate and evaluate the fire loss at the Kingston residence. This deposition was noticed up and taken by Kingston and DUC.

Benny Kingston: Benny Kingston is Joseph Kingston's daughter-in-law. She is not a party

in this litigation. Benny rented two storage units to Kingston after the fire. Her testimony was necessary to establish the status of personal property items claimed by Kingston to have been destroyed or damaged in the fire. Benny also had knowledge concerning who was residing in the Kingston home at the time of the fire.

Andrea Kingston, Joseph Peter Kingston, and Michelle Kingston: Each of these individuals are children of Joseph Kingston who resided in the subject property at some point in time. None of these individuals are parties to this litigation. These depositions were necessary to determine who resided in the house at the time of the fire for purposes of supporting Continental's claim that Kingston misrepresented the fact that the home was a single family dwelling. Their depositions were also necessary for determining the scope of the fire and alleged property damage.

Rachel Orley Young: Rachel Young is Joseph Kingston's sister, and not a party to the litigation. Ms. Young works for Fidelity Funding, a Kingston family business, and was involved in the administration of Joseph Kingston's "loan" on the subject property. Her deposition was necessary for gathering information on who actually owned the subject property, and the relationship between Kingston and DUC.

Ruth Davis: Ruth Davis is Joseph Kingston's niece. She is not a party to the litigation. Ms. Davis also works for Fidelity Funding, a Kingston family business. She too was involved in the administration of Joseph Kingston's "loan" on the subject property. Her deposition was necessary for gathering information on who actually owned the subject property, to clarify inconsistencies obtained in other forms of discovery, and to clarify the relationship between Kingston and DUC.

Kimly Mangum: Mr. Mangum is a structural engineer and architect hired by Kingston to evaluate the fire damage to the subject property. Kingston designated Mr. Mangum as an expert

witness who would testify at trial. His deposition was necessary to discover the expert opinions he would offer at trial.

The parties do not dispute that the deposition costs were incurred in good faith. The only question is whether the costs were an economical means by which Continental obtained the discovery of these individuals. In considering this issue, it is important to remember that this case involves a secretive transaction between highly secretive and closely held family business associations and equally highly secretive individuals. Because of these unusual circumstances, discovery was more cumbersome and difficult than normal. Continental asserts that the trial court properly awarded the costs of the depositions in this case.

Continental also claims that, as the prevailing party below, it was entitled to recover $137.50 in witness fees. In order to recover such witness fees, Continental is not required to meet the above-stated standard that applies to deposition costs. Witness fees are treated differently because the Utah Legislature has expressly recognized that witness fees are taxable costs that should be paid by the losing party. Utah Code Ann. § 78-46-28 sets forth the statutory witness fees.[17] Utah Code Ann. § 78-46-30 provides that "fees of witnesses paid in civil causes may be taxed as costs against the losing party." The Utah Supreme Court expressly noted that "[t]here is no standard of effectiveness in he statute that a witness's testimony must meet before the costs are allowed." Bd. of Commissioners of the Utah State Bar v. Peterson, 937 P.2d 1263, 1273 (Utah 1997) (holding that trial court did not abuse discretion in awarding statutory witness fees to prevailing party, even though trial court had abused its discretion in awarding deposition costs for

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[17] The current statutory witness fee is $18.50. Most of the witness fees incurred by Continental in this matter, however, were incurred at the old rate of $17.00. See Utah Code Ann. 78-46-28.

those same witnesses). Since the witness fees being sought by Continental are recoverable as taxable costs under Utah law, the trial court did not err in awarding such fees to Continental as the prevailing party.

CONCLUSION

For the foregoing reasons, plaintiff/appellee Continental Insurance Company respectfully asks this Court to grant the following relief:

1. To affirm the trial court's grant of summary judgment in favor of Continental;
2. To affirm the trial court's denial of DUC's motion for summary judgment;
3. To affirm the trial court's denial of the motion to strike the affidavit of Kathleen Wentzel and portions of the affidavit of Brent Christensen; and
4. To affirm with modification the trial court's award of costs to Continental.

DATED this 15th day of September, 2004.

STRONG & HANNI

By _____
Stephen J. Trayner
H. Scott Jacobson
Robert W. Harrow
Attorneys for Continental Insurance

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2004, two true and correct copies of the foregoing **BRIEF OF APPELLEE** were sent via U.S. mail, postage prepaid, to each of the following:

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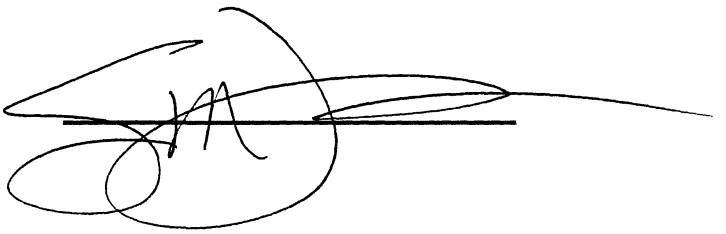
F. Mark Hansen P.C.
431 North 1300 West,
Salt Lake City, UT 84116
Attorneys for Appellant
DUC Company, Inc.

Carl E Kingston, #1826
3212 South State Street
Salt Lake City, UT 84115
Attorneys for Appellant
Joseph O. Kingston



ADDENDUM

1. Reservation of rights letter, dated March 13, 1998.

Tab 1

GLENN C HANNI P C
HENRY E HEATH
PHILIP R FISHLER
ROGER H BULLOCK
R SCOTT WILLIAMS
DENNIS M ASTILL
S BAIRD MORGAN
STUART H SCHULTZ
PAUL M BELNAP
STEPHEN J TRAYNER
JOSEPH J JOYCE
BRADLEY W BOWEN
ROBERT L JANICKI

ELIZABETH L WILLEY[2]
PETER H CHRISTENSEN[1]
H BURT RINGWOOD
DAVID R NIELSON
CATHERINE M LARSON
KRISTIN A VANORMAN
KENNETH W MAXWELL[3]
D JOSEPH CARTWRIGHT[1]
GEORGE D KNAPP
SARA E BOULEY
DARREN NELSON
PETER H BARLOW
JILL MCLAUGHLIN

1 ALSO MEMBER OREGON BAR
2 ALSO MEMBER WASHINGTON D C BAR
3 ALSO MEMBER COLORADO BAR

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ESTABLISHED 1888

GORDON R STRONG
(1909-1969)

OF COUNSEL
ROBERT A BURTON

March 13, 1998

Via Hand-Delivery and U.S. Mail

Mr. Carl E. Kingston, Esq.
3212 South State Street
Salt Lake City, Utah 84115

RE:		
	Date of Loss:	7/4/97
	Loss Location:	1201 N. 200 W., Bountiful, Utah
	Insurance Company:	Continental Insurance
	Policy No.:	US902818552
	Claim No.:	P9040095

Dear Mr. Kingston:

We are in the process of investigating your client Joseph Kingston's claim resulting from the above-referenced fire to determine CNA's obligations under the subject insurance policy. CNA believes there are several bases for questioning coverage for certain damages arising out of the loss of July 4, 1997. Mr. Kingston's policy provides and requires:

> **4. Your Duties After Loss.**
> You agree to see that the following things are done after a loss. We have no duty to provide coverage under this policy unless there has been full compliance with these duties:
>
> * * *
>
> d. Protect the property from further damage. If repairs to the property are required, you must:
>
> (1) Make reasonable and necessary repairs to protect the property; and
>
> (2) Keep an accurate record of repair expenses.
>
> e. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that

justify the figures in inventory.

f. As often as we reasonably require,

(1) Show the damaged property before its repair or disposal, except as provided in 4.d., above;

(2) Provide us with records and documents we request and permit us to make copies; and

(3) Submit to examination under oath, while not in the presence of any other **covered person** and sign the same.

* * *

h. Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) The time and cause of loss.

(2) The interest of the **covered person** and all others in the property involved and all liens on the property.

(3) Other insurance which may cover the loss.

(4) Changes in title or occupancy of the property during the term of the policy.

(5) Specifications of damaged property and detailed repair estimates.

(6) The inventory of damaged personal property described in 4.e. above.

(7) Receipts for additional living expenses incurred and records that support the Fair Rental Value loss.

* * *

i. Cooperate with us in the investigation or settlement of the claim.

j. The Policy provides that CNA is not liable for "covered property to an extent greater than ... [defendant's] insurable interest in the property."

* * *

10. CONCEALMENT OR FRAUD

This insurance is based on your honest cooperation with us so the information you gave to us must be correct to the best of your knowledge.

Therefore:

(a) For Personal Liability, Optional Excess Liability Home — Medical Expense and Dwelling Fire — Medical Expense, we do not provide coverage to one or more covered persons who whether before or after a loss has:

(1) Concealed or misrepresented any material fact or circumstance; or

(2) Engaged in fraudulent conduct; or

(3) Made false statements relating to this insurance; whether as to eligibility or claim entitlement.

(b) For all other coverages, we do not provide coverage if whether before or after a loss one or more covered persons has:

(1) Concealed or misrepresented any material fact or circumstance; or

(2) Engaged in fraudulent conduct; or

(3) Made false statements relating to this insurance.

CNA believes that the subject insurance policy, including, but not limited to above-referenced provisions, may provide a basis for denying coverage, in whole or in part, to Mr. Kingston for the loss of July 4, 1997.

CNA's investigations into this loss is done with a full reservation of rights. Furthermore, any payments made by CNA previous to this date for this loss were made with a full reservation of rights on behalf of CNA. The fact that CNA has investigated this loss and will continue its investigation and adjustment of the loss shall not be deemed to constitute a waiver of estoppel of CNA's right to later deny coverage for the loss.

Notwithstanding this reservation of rights, CNA will continue to pay your client for the additional living expenses associated with his and his family's relocation elsewhere as provided for by his insurance policy while the resident premises are uninhabitable up to the applicable policy limit for such coverage. CNA reserves all rights, however, to stop payment, deny further coverage, and/or recoup any monies paid under the policy if CNA determines that it has or had no obligation to provide coverage to Mr. Kingston or others for losses sustained in the fire. In other words, CNA's prior payment and future payments to Mr. Kingston for additional living expenses shall not be deemed or constitute a waiver of CNA's right to deny coverage at some future time and shall not serve as a basis for waiver or estoppel against CNA.

CNA wishes to remind your client of the suit provision under his

> No action may be brought unless the policy provisions have been complied with and the action started:
>
> a. Within three years after the date of loss; but
>
> b. Not until 30 days after the proof of loss has been filed and the amount of loss has been determined.
>
> However, the three year period is extended by the number of days between the date the proof of loss is submitted and the date the claim is submitted in whole or in part.

Mr. Kingston should be aware that if it is determined that he has not complied with the provisions of his policy, his ability to maintain suit against CNA for the July 4, 1997, loss may be in jeopardy.

Your client should continue to submit his additional living expenses with appropriate supporting documentation to the undersigned for further consideration and handling.

Yours truly,

STRONG & HANNI

By: _____
Stephen J. Trayner

SJT:jls
cc: Janell Fisher
Paul Capehart
2404 996